FILE COPY.

2922

Office Supreme Court U. S.
FILED
MAR 7 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 409.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

DAVID G. BAIRD ET AL.,
Appellees.

BRIEF FOR APPELLEES RICHARDSON AND STURGES ON APPEAL.

GEO. F. BROWNELL,
ADELBERT MOOT,

Attorneys for the Appellees
G. A. Richardson and E. B. Sturges.

PRESS OF "THE BUFFALO COMMERCIAL."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 409.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

E. B. STURGES AND G. A. RICHARDSON,
Appellees.

BRIEF FOR SAID STURGES AND RICHARDSON,

Appellees.

Statement.

In form this is an appeal by the Interstate Commerce Commission. October 31, 1902, Mr. William Randolph Hearst instituted a proceeding before said Commission, alleging that the rates charged by the Philadelphia & Reading Railroad, and other railroads, for the transportation of anthracite coal to tide-water, at New York were unlawful because they were either, (1) "unreasonable and unjust," or because they created (2) "undue and unreasonable 'prejudice and disadvantage," or because they were "unjustly 'discriminating" when compared with "rates contemporan-'eously charged," or because they were (3) "pooled" freight rates. (*Petition Ex. A, pp. 39 to 42*). The railroad companies complained of made different and separate answers. While different in terms, in substance each of these answers denies each of these charges. (*Answers pp. 42 to 54*). That proceeding was tried before the Commission. During its trial appellees declined to answer certain questions and to produce certain contracts as *irrelevant* to the issues being tried, because the questions and

contracts were as to certain sales of coal at the breakers in Pennsylvania, or as to the sale of certain Pennsylvania mines to the Temple Iron Co., a corporation mining coal in Pennsylvania, or as to how the price of coal was fixed and commissions paid to coal merchants in New York. The United States Circuit Court, Lacombe, J., was applied to by the Commission to compel answers, and the production of contracts. Judge Lacombe considered the petition therefor, and answers of various appellees thereto (*pp. 1 to 229*), *inspected the contracts, not printed here,* examined over 1,500 pages of evidence already given and many exhibits, and then held that most of the evidence and contracts *sought were not "relevant" to the issues being tried, this being the sole ground of his decision.* (*See opinion pp. 832-836*). That order did not end the case. It is still undecided.

None of the appellees was a party to that proceeding before the Commission. The order appealed from is not a final order or judgment in that proceeding. It is not a final order or judgment of any court in a suit which has resulted from that proceeding. The order appealed from is a collateral supervisory order.

Since Judge Lacombe's decision the Commission have had further hearings, Hearst has given further evidence *and rested,* some of the defendants have given their evidence, others have rested because Hearst's evidence required no answer; the evidence is closed and the Commission set a day for argument.

That order is not certified to this Court upon any questions of law. No appeal from it has been taken to the United States Circuit Court of Appeals. It involves no constitutional question. The Commission waived the part of the decision favorable to its application in entering the order from which it now appeals. (*See pp. 832 opinion and 836 and 837, order*).

This appeal was not allowed by Judge Lacombe or any Judge. (*P. 842*). Judge Lacombe granted an order to show cause before this Court, August 11, 1903, during the vacation, and no appearance was then made by *appellees,* the appellees preferring to test the jurisdiction of this Court to entertain the appeal by a motion to dismiss, which has been duly noticed. We claim this appeal will not lie for the want of any statute authorizing it. If we examine the facts we shall also see the merits are with the *appellees.*

In what we shall say about the facts, the Commission's attitude, and rulings upon evidence, become important. We shall try to state the facts fairly, accurately, and as briefly as possible. The facts show an attempt to have an *unlimited investigation* into railroad and coal mining corporations, and the business of mining and selling coal, instead of a *trial of the issues on rates* before the Commission for trial. Our clients took the position that contracts for the purchase of coal at the breakers' mouth in Pennsylvania were irrelevant.

Facts.

Mr. Hearst alleges he "is of necessity a purchaser of anthra-"cite coal" (*p. 39*) but no proof of this fact was given, despite the fact that many of the answers begin by alleging that he "has no "authority to present this petition" (*pp. 43-49*), while others specifically put him to his proof "as to the necessity for his pur-"chasing anthracite coal" (*p. 45*). Mr. Hearst's counsel filed an *exparte* application to compel the production of "all contracts "* * * and books of account * * * of all *purchases* of anthracite coal * * * also *all* check and check stubs "used for coal purchased" (*pp. 54-57*). This application covered "transportation" also, but we shall soon see the vital part turned out to be the part about "purchases" and prices of coal, a subject upon which nearly all our time was spent, although the Commission has no jurisdiction over it.

In the *exparte* affidavit filed in support of this application the most the attorney for Mr. Hearst could swear to was, "that the "contracts called for are ostensibly *contracts for the purchase of* "*anthracite coal* from mine owners or operators" (*p. 58*). Without even giving the railroad companies a chance to be heard upon this application (and not withstanding the decision of the commission itself written by Cooley, Ch., while a member of the Commission holding that a subpoena *duces tecum* should not issue requiring the production of "certain contracts for the sale of "coal * * * unless their bearing upon the controversy is "manifest," because "third persons have rights in such contracts," and such parties "certainly lose no rights by reason of being "strangers to the proceeding"—*opinion, Haddock case, 3 I. C. R.*,

312, 313), the Commission ordered the subpoena *duces tecum* to issue, it was issued and served, and the service thereof is made the basis of the application by the Commission for the order refused by Judge Lacombe (*p. 3*).

We should now note that such subpoena, *duces tecum*, was not asked for in aid of a general investigation by the Commission under Sec. 12 of the Interstate Commerce Act. It was asked for because the railroad companies had denied the charges of the petition, thus putting them in issue. Thereupon, as the Commission allege in their petition for the order herein, the Commission "ordered a *hearing* upon said complaint" (*p. 2*). So the application for the subpoena was made because of "the *hearing* "set in the above entitled matter" (*p. 54*). The matter so set for a "hearing" being one before the Commission where the election of Mr. Hearst to bring it precludes a suit in equity by him for the same matter (*Sec. 9*), the Commission were confined to "the matters complained of" (*Sec. 13*), and could only decide that matter, because, if the "common carriers" thereupon gave the "complaining" party "satisfaction" before the "hearing," the Commission were to so record the fact, and the common carrier would be thereby relieved "from further liability" (*Sec. 15*). The Commission's charter thus shows Mr. Hearst had no standing before the Commission to maintain the proceeding as a substitute for a suit in equity unless he proved a case in equity.

Nevertheless neither the counsel for the petitioner, nor the Commission, observed these provisions of the statute as to such proceeding and the scope of the "hearing" appointed. The Commission disregarded the provisions of the statute, that expressly deprive them all jurisdiction over all matters involving the "receiving, delivering, storage, or handling of *property*, "wholly within one state" (*Sec. 1*), which certainly covers wholesale or retail *sales* of mines, corporation stock, or coal, "wholly within" Pennsylvania, or "wholly within" New York, and all details thereof, such as issuing monthly price circulars, fixing prices, giving security, or guarantees of security, and the like. Instead, the Commission insisted upon contracts and oral testimony as to *sales of mines and coal "wholly within one state."* The act could not and did not confer jurisdiction as to such matters.

Not regarding these limitations of the act, counsel for Mr Hearst opened the hearing April 21, 1903, by calling upon the witnesses subpoened to produce "the books and papers called for" (*pp. 229, 230*). Of course they were not produced at that time. Then followed counsel's opening. He stated that *three* proceedings had been started by Mr. Hearst, and that one was when he sought to have the "United States District Attorney "and the Attorney General of the United States * * * set "in motion the machinery of the law," but despite "evidence" this proceeding, or application was, "for some reason or other, "buried at Washington for many months" (*p. 237*).

That the *second* was when "Mr. Hearst turned to this forum * * * "*recollecting it had to do with the institution of every proceeding that* "*has taken place under the Sherman anti-trust law* that has "amounted to anything" (*p. 237*). (Surely this is strange, if true, because long ago in its written request to the United States Attorney General for an opinion, *the Commission argued that* "*it* "*is not in the province of this Commission to determine whether the* "*testimony * * * shows a violation of the anti-trust law,*" and Attorney General Griggs pointed out to the Commission that the Sherman anti-trust law was not intended to prevent numerous railroads from advancing freight rights, at the same time after consultation with each other; also that such advance shows no "contract" or "conspiracy" * * * in restraint of interstate "commerce." (*See: Annual Report I. C. C., 1899, pp. 16, 19.*)

The third proceeding was one before the Attorney General of New York under the so called Donnelly anti-trust act of that state. (*See: Report Attorney General, N. Y., for 1903, not yet printed.*)

Counsel thus stated the purpose of the proceeding before the Commission; "we propose to go into that (combination) just as "thoroughly as we may to develop all the facts at our disposal so "that this Commission shall * * * certify its findings to the "Attorney General of the United States for such action as he "deems proper to take" (*p. 239*). Counsel concluded: "Now, "all these facts * * * present an *irresistible case of combina-* "*tion in restraint of interstate commerce which is within the Sherman* "*anti-trust law* and the law under which your body was organized, "not only confers upon you power, *but imposes upon you the duty* "*of investigating* the conduct of the business of common carriers

"*We ask you to make such an investigation here, and * * * a thorough one.*"

Here we have the gist of this case. The Commission was asked to "investigate" as to alleged anti-trust matters not committed to their jurisdiction, or, as the Commission put it in 1899, "not in the province of the Commission to determine." Did the Commission repel the charges made against a superior branch of the government, or even refuse to enter upon an unlimited "investigation" they had already declared to be "not in the "province of the Commission to determine"? No. Did it sustain counsel for the railroads, in objecting to such an "investigation"? No. Did it enter upon such an "investigation"? Yes. Its very petition for the order refused by Judge Lacombe repeats again and again, as to various witnesses and contracts, "your petitioner "was engaged * * * in the discharge of its duty * * * "and in the exercise of its authority *to inquire into the manage-* "*ment of the business of common carriers * * * and to keep* "*itself informed as to said business * * * and your petitioner* "*is of the opinion that said contracts are* not only material and "relevant to said issues on trial in said proceeding, *but * * *** "*the production thereof * * *** is necessary to enable your "petitioner to discharge its duty * * * *and to inform* your "*petitioner as to * * * the business of said common carriers*" (*See pp. 14, 20, 29, 37, 38*). In the brief of Mr. Solicitor General Hoyt to advance this case it is said the "contracts" and evidence sought are necessary "to the determination of issues in a pend-"ing cause before the appellant, and * * * *to inform appel-* "*lant as to * * * the method in which the business of common* "*carriers is conducted and to enable appellant to obtain the full and* "*complete information necessary to * * * perform the duties* "*** * * *for which it was created.*"

Here we have it! The Commission ask the courts to aid them in a general "thorough investigation" such as counsel for petitioner sought!

Judge Lacombe held that the Commission were not at liberty to go upon such a fishing excursion because they were confined to the "hearing upon said complaint" which they had alone ordered (*p. 833*). Upon the hearing, however, neither counsel for

Mr. Hearst's Exhibits nor the Commission, so viewed the matter. Instead numerous exhibits, not filed, or printed here, were put in evidence to show that the railroads have a large income (*Ex. 5, p. 264*); their average freight (*Ex. 6, p. 266*); their gross freight (*Ex. 7, p. 269*); and that the gross earnings per mile for all railroads for the United States were $8,123, while for the railroads complained of the gross earnings were, per mile (*p. 271*):

Reading, . . .	$27,572	Lehigh, . . .	$17,567
D., L. & W., . .	27,516	C. of N. J., . .	21,829
Ontario & W. .	11,078	D. & H., . . .	17,691
Pennsylvania,	25,527		

It was insisted that, without proof of similarity of condition, such evidence and such comparisons were no more competent as to rates upon coal than would be like evidence and comparisons of *gross earnings* of common wagoners all over the country, where like disparities appeared, but the Commission ruled otherwise (*Ex. 8, pp. 271-272-273*). Other schedules were put in evidence comparing operating expenses and gross income (*Ex. 10, p. 277*); the proportion of loaded cars (*Ex. 11, p. 277*); the average freight tonnage per engine (*Ex. 12, p. 278*); the average haul per engine (*Ex. 13, p. 278*); the average number of tons per mile (*Ex. 14, p. 279*); the percentages of expenses for maintaining way and structure (*Ex. 15, pp. 279-280*); the average of fuel consumed per ton per mile (*Ex. 16, p. 280*); but all these exhibits showed such striking differences between the various railroads, as between themselves, and as to all the railroads of the country, that they failed to establish any fact of any importance.

Next was offered an exhibit purporting to show the cost of hauling freight, obtained by multiplying the rate by operating expenses, according to counsel. This exhibit would have been valuable as settling a point unsettled by the ablest and most experienced railroad experts like Mr. Albert Fink, but it turned out to be so incompetent that the Commission could only permit it to be marked for identification (*Ex. 17, for identif., p. 280*). Exhibits 18, 19, 20, 21 and 22 to show tonnage, coal tonnage, stock and debt, shared the like fate for the same reason (*pp. 280, to 287*). From the argument of counsel in support thereof this Court can see how the various railroads differ in stock

and debts, and how incompetent such exhibits must be as to rates unless they are made competent by other proof (*pp. 284-285-286*). Then began the struggle to investigate still further a field, and to put in evidence contracts for the sale of coal at the "breakers" in Pennsylvania (*p. 287*). Mr. Gowen stated clearly some of the reasons why they were irrelevant (*pp. 295 to 297*). Commissioner Prouty said: "It is conceivable that the testi-"mony might be admissible as not interfering with rights of "third parties, *when the contract might not be*, and would it not "be well for you to have a witness here and ask him those ques-"tions and let the whole thing go up at once" (*p. 300*).

He also said: "You have declined to produce the contract "and we have received the secondary evidence" (*p. 373*). He also said: "*If the material thing were what* the contract was, or "what was done under that contract, it would be another ques-"tion. *That is not directly in issue*" (*p. 375*). Mr. Gowen was therefore justified in respectfully declining to produce the contract as "totally irrelevant" (*pp. 298-9*). Other counsel, *including counsel for these appellees*, took the same position as to contracts and questions each and all of which are specified and covered in the opinion of Lacombe, J., (*pp. 832 to 836*). The Commission had its attention called to the opinion of Cooley, Ch., in the *Haddock case, 3 I. C. R., 312-313, as to such contracts for the purchase of coal*, by Mr. Ross but refused to follow it (*p. 302*). Mr. Thorne also well stated the reasons why the contracts were not produced (*pp. 307-8*). Judge Campbell rested his objections for the Reading upon the validity and private and domestic character of the contracts involved (*pp. 349-353*). *As to the Temple Iron Co. contracts*, Mr. Davies stated the points fully (*pp. 351-2*). Mr. Brownell did the same (*pp. 357-8*). So forcible were these reasons that the Commission ruled: "The Chairman—'We are not "free from doubt upon this question. We are constrained to "hold, *in view of the statements of complainant's counsel*, that "further evidence will be produced in connection with the con-"tracts in question, that this objection should be overruled. *Of "course as the evidence stands now it is clear the contracts are not "admissible.*'" Mr. Brownell pointed out "the rates have been "in force a great many years * * * have lowered during "the past fifteen years" (*p. 359*). This being undisputed it can

be seen, as was then pointed out, that the Temple Iron Co. contract made February 27, 1899, as to a mining corporation, which corporation was organized by a statute of Pennsylvania, March 22, 1873, could not have caused or influenced the rates in question, although the Commission ignored this fact (*pp. 365-6*). *No evidence was afterwards given to make these Temple Iron Co. contracts admissible that the Commission then ruled were clearly "not "admissible."*

The reason why counsel was so insistent upon going into the contracts and everything, however irrelevant, is shown by his own statement. He said: "*My theory is that this* (*purchase con-"tract*) *method of doing business should be broken up*" (*p. 386*).

So this declaration shows the intent to destroy the Pennsylvania purchase contracts. One of the contracts of coal purchase in Pennsylvania was read in evidence by counsel (*p. 377*) *and he also requested Mr. Jermyn to produce one, he sent one to the Commission, and that was put in evidence* (*pp. 406–766, 767, Ex. 35*).

The Commission allege it is "identical" with those not produced and that was not disputed (*pp. 14–17*). These contracts were purchase contracts "*to deliver on cars at breaker*" (*pp. 15–767*).

There was another form of contract used by the Ontario Ry. alone, a "transportation" contract, but that was produced without objection and put in evidence (*p. 809–811*).

The Temple Iron Co. charter and contracts were not only submitted to the Commission for inspection, as were the other contracts, but they were submitted to Lacombe, J. and may be found annexed to the answer of Mr. Baer herein (*pp. 65–93*).

It thus appears that the evidence now sought is at most merely cumulative evidence. The other contracts are sought for purposes merely inquisitorial.

There is very little evidence in the record really relevant upon whether the rates are (*1*) "*unreasonable and unjust,*" (*2*) "*unjustly discrim-"inating,*" *or* (*3*) "*pooled.*" The remaining exhibits are the charter of the Temple Iron Co. (*Ex. 24, p. 525, printed p. 65*); annual report of the Reading (*Ex. 25, p. 586*); tables of the Reading (*Ex. 26, p. 587*); charter of the Hillside Coal & Iron Co. (*Ex. 27, p. 607*); annual reports of the D. L. & W. R. R. (*Ex's. 29, 30, 31, 32, p. 669*); price circular of the D. L. & W. R. R. (*Ex. 33, p. 671*);

Ruly's table of prices for which coal sold at New York tide-water (*Ex. 34, should be p. 727*); Jermyn contract for sale of coal at Pennsylvania breaker, (*Ex. 35, p. 767*); Ontario Railroad contracts for transportation coal (*Ex's. 38, 39, 40, 41, p. 815*); annual reports Ontario Railroad (*Ex's. 42, 43, 44, 45, p. 829*). These very exhibits show that the counsel and commission were not limited to the field prescribed by statute or issues. The oral evidence shows this fact still more clearly. After Mr. Baer had been examined by the counsel for Mr. Hearst for two days and a half at different times a short dialogue shows what the Commission thought about his examination.

We quote it. "*Commissioner Prouty: There has been very little "said in your examination about the unreasonableness of this rate on "coal,* and I will sometime before the case is closed want to ask "you some questions on that * * *"

"*Mr. Baer:* I would be glad if you will do that * * * I "will be very glad to come" (*p. 590*). All that was in fact said by Mr. Baer on the rate on coal was volunteered, and showed that rate reasonable, fair, and not pooled (*pp. 185-188-191, 192, 193*).

Mr. Baer came back and Com. Prouty examined him but his evidence had more to do with industry generally (*p. 771*); dense traffic (*p. 772*); earnings (*pp. 773 to 775*); debt (*p. 776*); interest and rents (*pp. 777 to 778*); bridges (*p. 779*); capitalization (*p. 780*); reports (*p. 781*); equipment (*p. 783*); fixed charges (*p. 785*); competition (*pp. 786, 789, 792*); price (*p. 787*); bond-holders (*p. 791*); than rates (*pp. 793 to 795*). He went into wages increase caused by the strike (*p. 796*). Com. Prouty said at the time: "*I "am not trying to show that your railroad rate on coal is unreasona-"ble. What I am trying to show now is that it is a matter entirely "immaterial to the Reading Company, whether you make the rate $1.00 or $1.50 a ton*" (*p. 790*). Surely then it was an investigation of *price*, not a trial about rates, that the Commission was hearing.

Mr. Thomas was subjected to the same kind of an examination, but not so lengthy. What were these witnesses questioned about? How did they fill this bulky record? The Court will have to read it to appreciate the "thorough investigation" had. We may help by giving a birdseye view of the witnesses.

Witnesses.

Mr. Waterman, Secretary of the New Jersey Central Railway, was asked about the ownership of the corporate stock and about the general business of the Lehigh & Wilkesbarre Coal Co., a coal mining and selling corporation of Pennsylvania, not a party here (*pp. 305, 308, 309*); about the anthracite terminals of the New Jersey Central Railway (*p. 306*), and about whom the said Lehigh & Wilkesbarre Coal Co. had purchase contracts with (*p. 327*); and, while he answered these questions about the purchase contracts of parties all of whom were strangers to the proceedings, he refused to produce the contracts (*p. 307*).

Mr. Brown, Secretary of the Philadelphia Coal & Iron Co., a coal mining corporation of Pennsylvania, told of the ownership of the stock of that corporation, and of the Reading Company, (*pp. 315, 316, 317*); and of said coal company's coal purchase contracts (*pp. 318, 319*); but declined to produce them (*p. 319*).

Mr. Taylor, Secretary Philadelphia & Reading Railway Co., testified that company had no transportation contracts (*p. 320*); told who its officers were (*p. 320*).

Mr. Safford, is an employee of Coxe Bros., the largest independent operators. He told of unloading bituminous coal at Port Richmond (*pp. 321, 322*); of the necessity for keeping different kinds of anthracite coal separate, and making it more expensive to switch (*pp. 323 to 326*).

Mr. Weston worked for the Philadelphia & Reading Railway many years before (*p. 327*), and knew something of the cost of putting that coal on vessels then, but not much else (*pp. 327, 328, 329*). He has not been in the business for sixteen years (*p. 329*); and knows the methods of handling coal have been much changed since (*pp. 330, 331*).

Mr. Olhausen, once Superintendent of the New Jersey Central Railway (*p. 322*): thinks there is "very little difference" in unloading bituminous or anthracite coal by present methods (*p. 333*); has become more favorable to the railroad view since he was a witness for Coxe Bros. years ago (*p. 334*); says many anthracite mines cannot use large cars (*p. 335*); and more can be used for bituminous coal (*p. 336*).

Mr. Wilson, auditor Lehigh Valley Railway Co., tells of railway books (*p. 327*); and who would know of railway freights (*p. 339*).

Mr. Hebbard, secretary Guaranty Trust Co. of New York, tells of Temple Iron Co. contracts (*p. 343*); but refuses to produce them by advice of counsel Mr. Davies (*p. 367*).

Mr. McAnulty, Scranton merchant, connected with the Connell Coal Co. and Melville Coal Co. (*p. 368*); tells of effort Simpson & Watkins and others to build independent railway in 1899 (*p. 369*); of 60 per cent. basis coal purchase contracts there (*p. 370*); of negotiations for more favorable coal purchase contracts which resulted in increasing mine payment to 65 per cent. (*pp. 371–381*); and is still an independent dealer (*p. 380*).

Mr. Skeele, sales agent Lehigh Valley Coal Co., tells of salaries self and men are paid (*pp. 383, 384*); puts cost sale approximately at 10c. per ton (*p. 387*); wastage at 15c. per ton (*p. 388*); says coal company fixes price coal (*p. 390*); declines to go into details about price circulars under advice of Mr. Gowen (*p. 391*); gives market price of coal (*p. 392*); says railroad weights govern in putting coal on boats (*p. 394*); and that prices have been maintained better last six years (*pp. 395–396*).

Mr. Dewitt, New York coal merchant 30 years (*p. 396*); compares prices 1895 to 1902 (*p. 397*); tells of coal circulars of Reading and prices (*p. 398*).

Mr. Burns, New York coal merchant 25 years; says coal scarce two or three years and uniform price (*p. 398*); tells of price circulars received from various companies (*pp. 399, 400*); tells of amount and quality handled (*pp. 400, 401*).

Mr. Jermyn, Scranton independent coal operator (*p. 403*); gets 65 per cent. tide-water price at breakers and has for New York coal since 1900 (*p. 404*); used to sell for less (*p. 407*); majority independents sell for 65 per cent. prepared sizes; 50 per cent. pea; 40 per cent. buckwheat (*p. 408*); gives prevailing prices at tide-water (*p. 409*); tells different railroads to their different "breakers" (*pp. 410, 411*); gives increases wages miners (*p. 412*); says mines cannot be run full capacity from difficulty in getting miners to work (*pp. 413, 414, 416*); says market price depends on

demand (*p. 418*); sends his contract to Commission for evidence and it becomes *Ex. 35* and is printed (*p. 767*).

Mr. Baer, President Reading R. R. The examination of this able lawyer and candid witness takes such a wide range and, is, generally speaking, so entirely outside of the issues, and so full of general information that it cannot be summarized but must be read. *It even covered his opinion of Hanna and the strike of 1900!* (*p. 545*). We have already referred to some of it on rates (*pp. 188–193*; *also see pp. 420–444*; *524–591*).

Mr. Thomas, the testimony of former President Erie R. R., now President Lehigh R. R., takes almost as broad a range outside rates as does Mr. Baer, and must also be read for the same reason. He testified a little on rates (*see pp. 591–634, especially 617–618, 523–629, 632*).

Mr. Chambers, Secretary D. L. & W. R. R., tells of purchase contracts for coal but by advice of Mr. Ross refuses to produce them (*pp. 444–446, 448*); says these are not transportation contracts (*p. 447*).

Mr. Post auditor of the D. L. & W. R. R. tells of vouchers for coal purchases, (*p. 449*); which he declines to produce by advice of Mr. Ross (*p. 454*).

Mr. Sturges, Scranton, attorney and coal merchant, the appellee (*pp. 455-459*); tells of coal purchase contracts he declines to produce by advice of Mr. Brownell (*p. 457*); also of attempt in 1899 to build another railroad (*pp. 460-466*); also of negotiations for 65 per cent. contracts (*p. 466*); tells why anthracite coal must remain of high price (*pp. 469, 470*); tells prices in New York during coal famine (*pp. 472-474-477*); gives railroads credit for keeping down prices then (*p. 475*).

Mr. Howe, Philadelphia, tells of negotiations for 65 per cent. contracts and why changed conditions required higher prices (*p. 482*).

Mr. Edmonds, sales agent, Reading Coal & Iron Co., tells amount sold in New York by that company (*p. 483*); sales office expense (*p. 484*) of wastage of 1½ per cent. (*p. 486*); of how prices are fixed and circulars issued (*pp. 488-490-492*) of prices (*p. 491, 496*); of Ruley's report of sales of all companies (*p. 494*);

where New York tide-water coal goes (*pp. 495-506*); of competition for customers (*pp. 496-505-507-510*).

Mr. Richardson, Secretary Erie Railroad, appellee, was not sworn, but we agreed he had been subpoened to produce purchase contracts. He delivered the contracts to counsel, who had them in court, but who respectfully declined to produce them when requested so to do by the Commission (*pp. 311-314*).

Mr. Meeker, an independent coal merchant of New York, buys the majority of his coal on the 65 per cent. basis, or has since November, 1900. When coal is as low as $4 at tide-water, it only leaves $1.40 to pay transportation charges (*p. 511*). Prior to November 1, 1900, he adjusted his transportation charges with the Lehigh at the end of the month by rebates, but since that time he has paid a rate of $1.55 (*p. 513*). When coal gets as low as $4 in New York, so that transportation charges cannot be paid and money made, he does not bring prepared sizes to the New York market, but sends it "to other markets" (*p. 514*). He takes the same price as the railroad coal companies if he cannot get more (*p. 516*). When the rebate method of fixing rates was used, previous to November of 1900, "everybody," "all shippers," were treated alike (*p. 635*). Sometimes the rebates work out less than the tariff rates (*pp. 637–639*); sometimes more (*p. 640*). His rebates were the result of a contract made in January, 1892, with coal companies, from which he would not release them (*pp. 641–642*). There are hundreds of men in the coal business who buy coal *where they can get it the cheapest* (*pp. 643, 644*).

Mr. Heilner, sales agent of the Lehigh & Wilkesbarre coal company ten years (*p. 517*); President of his company fixes his price (*p. 519*). Price increases 10 cents a month from April to September (*p. 530*). (This is done as Mr. Baer and others tell us, to induce people to buy coal in the summer months, thus enabling the railroads to move their coal to market during the entire year with some regularity, instead of moving it as was once done, in a rush when winter sets in.)

Mr. Runyon, an independent coal merchant of New York (*p. 644*), tells of the cost of putting coal on board (*p. 645*).

Mr. Ruley, a statistician and publisher of New York, tells of the companies that send him figures each month showing the amounts sold and the price realized on each size (*pp. 645, 646*). These statistics furnished the basis upon which the miners were paid under their contracts, which provided:

"The general average f. o. b. prices herein referred to shall be "determined by a disinterested expert accountant satisfactory to "both parties * * * and the accountant each month "shall make a true average price for *each size sold at tide on all* "*the coal from the same region*, and the average prices thus "obtained shall be furnished by the accountant to the buyer and "sellers by whom they shall be accepted." (*Pp. 648–751; con-* "*tract p. 769.*) "Those statistics have been kept for over 30 "years; I have been doing it for thirteen years" (*p. 647*).

Later, the witness was recalled and furnished these statistics of the different companies, and for Cox Bros. & Co. under these contracts, and they were put in evidence (*pp. 726, 727*). This exhibit furnishes, in authentic form, all the necessary evidence as to the value of coal, or as to what the railroad coal companies get out of the 65 per cent. contracts. It further appearing from testimony to which we have referred that the independent operators also buy and sell on this 65 per cent. basis, it is readily seen that so far as value and the quantity sold are concerned in the rate, these authentic figures furnish controlling evidence. The amount sold at New York, tide-water, is about 20 per cent. of the entire country, or about thirteen million tons as a maximum.

The exhibits, and the examination of the witnesses from them, show striking discrepancies in the prices obtained in the New York market, even during the strike, when coal was scarce, and show how powerless are the railroads to control such a great market, when 30 per cent. of the coal sold is produced and sold by independents (*pp. 728–736*).

Mr. Payne is an independent operator of Kingston, Pa. (*p. 651*). He has a switch of his own connecting two railroads, has no contract with the railroad coal company, but sells on the "basis of "prices realized for at tide" (*pp. 652, 653*).

Mr. Truesdale is the President of the D. L. & W. R. Co. (*p. 653*).

Mr. Truesdale's testimony covers part of the same ground covered by the testimony of Mr. Baer and Mr. Thomas, and, like their testimony, cannot be summarized, but must be read, for it is a discussion of everything, from the foundation for coal rates to the details of railroad management.

Under the advice of Mr. Ross, Mr. Truesdale refused to produce the coal purchase contracts of his Company, or to give evidence touching the prices, etc. (*pp. 653 to 698*). He also makes clear why an advance of ten cents a month from April to September resulted to the advantage of producer and consumer alike (*p. 681*).

Mr. Peters, is a member of the firm of Williams & Peters, who are coal merchants handling large amounts of coal on commission, and producing on their own account (*p. 698*). He was questioned in detail as to the method of doing business, and also as to prices. He told of the methods and customers, but, under advice of counsel, he declined to reveal what commissions his firm received, or the details of their business (*pp. 698 to 710 and 737 to 743*). At first, the Commission sought to compel him to answer the questions declined (*p. 37*), but upon reading his answer to the petition of the Commission (*p 100*), the counsel for the Commission was instructed to withdraw the application as to Mr. Peters, and the order discloses that it was withdrawn (*p. 837*).

Mr. Olyphant, formerly president of the Delaware & Hudson (*p. 710*), tells of its coal business, and his observations with reference to exhausting the coal supply, coal strikes, and like matters (*pp. 714, 715, 716*): also about the law of supply and demand (*p. 721*).

Mr. Kemmerer, an independent coal operator of Philadelphia and New York (*p. 743*), says the price of coal at tide-water cuts no figure with them, because their coal "goes largely to line points" (*p. 745*). He pays the regular rates (*p. 745*). Only the surplus coal is shipped to New York (*p. 746*). He can never get a rebate (*p. 748*). They handle bituminous and anthracite, and when there is a change in price circulars are issued announcing

the fact (*p. 752*). The published rate is what is paid for transportation (*p. 754*).

Mr. Peale, is an independent coal merchant of New York. He has paid the regular rate for years (*p. 758*). They also advance their price ten cents a month (*p. 759*). There are a large number of independent dealers (*pp. 760, 761*).

Mr. Herbert, is an independent coal merchant of New York. During the strike they made arrangements to operate a mine, that they might supply their customer, The Manhattan Elevated (*pp. 763, 764*).

Mr. Harris, formerly president of the Reading (*p. 797*), tells of a meeting in 1896 where it was found—

"Looking to the history of all the roads for ten or twenty "years, we found that whether we were working in reasonable "agreement, or whether we were working against each other, it "came to about the same thing * * * "stop fighting." (*pp. 798, 799*).

"The understanding was * * * the percentage to which "we were entitled. *Neither we nor anybody else stopped at that "line*" (*p. 799*).

Mr. Henderson, Second Vice-President Philadelphia & Reading Coal & Iron Company (*pp. 799 to 805*) gave no testimony of importance at the hearing before Judge Lacombe, although he was examined after that hearing in detail.

Mr. Childs, General Manager of the N. Y., O. & W. R. Co. (*p. 805*), tells where their railroad taps the coal country, where 12,000 acres were situated, and how much coal they produce (*pp. 805, 806, 807*). He gave in evidence a *transportation* contract with the Elkfield Coal & Iron Company (*p. 809*), and testified concerning other contracts of like character (*p. 814*); also concerning prices (*pp. 820-822*), the grades of their railroad (*p. 824*), the proportion of cars that go back empty (*p. 825*), and gave some reason why anthracite should pay a higher rate than bituminous (*pp. 827, 828*).

Of course this testimony does not include that given after the hearing, before each party rested, the evidence was declared closed, and the Commission set a day for hearing the closing

arguments. *Presumptively that evidence covered all issues or subjects before the Commission.* This shows, however, what Judge Lacombe had before him in the way of exhibits and evidence from which to determine whether or not the contracts sought in the questions put but not answersd, were relevant. The more this Court looks into the record, the more we believe it will be convinced that Judge Lacombe was right in concluding that the evidence sought was not relevant, either upon any primary issue or any secondary issue before the Commission. We shall stand largely, therefore, upon this review of the exhibits and evidence, and the opinion of Judge Lacombe, and the very character of the questions set forth in that opinion, to sustain us in our claim that the evidence sought is not relevant, unless this Court shall be of the opinion that the Commission has unlimited power, *in the Hearst proceeding*, to investigate as to coal mining, coal corporations, and coal selling. We have given this brief review of all the evidence because the coal purchase contracts sought from Mr. Richardson and Mr. Sturges, the appellees who are our clients, are of the same general character as those sought from many of the other appellees; also because we hope our brief review of the exhibits and testimony in this bulky record will be of some assistance to the Court in its consideration of this case.

POINTS.

I

This appeal should be dismissed for want of any statute authorizing it.

This case is not unlike the case of a "supervisory" order in bankruptcy proceedings, that is not a final order (*Wisall vs. Campbell, 93 U. S., 347*; *Cauro vs. Crane, 94 U. S., 441*); or an order dissolving an injunction pending suit, (*McCollum vs. Eager, 2 How., U. S. 61, 64*); or the case of a *discretionary* order refusing to open a decree (*Brockett vs. Brockett, 2 How., 238, 240*); or an order refusing to let one intervene as a party (*Ex Parte Cutting,*

94 U. S., 14). The ground of these and like decisions is that the order appealed from does not dispose or affect the main proceedings upon the merits. *So here the main proceeding is still pending and not decided.* As the Commission can render its decision therein upon the merits upon the evidence before *and afterwards given*, by both parties, the order complained of is merely interlocutory, and so no appeal from it will lie (*McGourkey vs. Railway, 146 U. S., 536, 545*). Furthermore, all the relevant facts being proved and undisputed, and the evidence sought to be adduced, at most, merely cumulative, this Court should apply the same rule here it does in other cases where there is "some" evidence, and should hold that this, "being a matter "resting in the discretion of the trial court, the action that court "in the premises is not assignable for error" (*VanStone vs. S.&B. Mfg. Co., 142 U. S., 128, 134*).

Moreover, the rules of this Court expressly require the exhibits to be printed; this has not been done here, and without them this Court cannot say that Lacombe, J., with all the evidence and those exhibits before him (*p. 38*), was not justified in his decision; for the presumption is that his decision is correct.

Finally: We have filed a brief to dismiss this appeal, reviewing the statutes and their construction and have shown therein that in the prior statutes, or in the amendments of 1903, there was no intent to permit a direct appeal to this Court in collateral and interlocutory proceedings of this character.

The history of the amendments of 1903 shows as much. They are results of the numerous so-called anti-trust acts that were proposed. January 21, 1903, the Elkins bill was introduced into the Senate by Senator Elkins whose name it bears. January 27 it was reported back with amendments. February 3 it was further debated, amended and passed by the Senate. As passed it authorized the Commission when it has a "belief" that a "common carrier" is carrying "passengers or freight * * * "at less than the published rates * * * or committing any "discriminations" to "present a petition alleging such facts to "the Circuit Court of the United States sitting in equity" and that the Court shall "summarily inquire into the circumstances" and "being satisfied of the truth of the allegations * * *

"said Court shall inforce the published tariff," etc. As passed it also contains the words: "The said Court shall have the power "to compel the attendance of witnesses * * * and to com- "pel the production of all books and papers relating" to "*the* "*matter in controversy*" * * * *such transaction.*" February 4 the bill went to the House and was referred to its committee. February 12 it was reported back with the following amednment: *The so-called expedition act to expedite important government suits like the Northern Securities case had then already become a law February 11, 1903.* The act appropriating $500,000 for counsel and expenses in important government suits was also passed February 4, 1903.

The report of the House Committee of Interstate and Foreign Commerce made February 12—amended the Elkins act after the other acts had thus become laws. That report concludes as follows:

"Insert in the'end of Section 3 the following:

"'*Provided*, That the provisions of an act entitled 'An Act to "expedite the hearing and determination of suits in equity pend- "ing or hereafter brought under act of July 2, 1890,' entitled "An Act to protect trade and commerce against unlawful re- "straints and monopolies,' 'An Act to regulate commerce' "approved February 4, 1887, or any other acts having a like "purpose that may be hereinafter enacted,' *approved February 12,* "*1903*, (should be February 11), shall apply to any case prosecuted "under the direction of the Attorney General in the name of the "Interstate Commerce Commission.'"

Why was this proviso suggested? Was it proposed to cover and expedite appeals in purely collateral and "supervisory" proceedings like the one under discussion, or was that amendment *intended* only to reach and cover suits in equity brought by the Commission in the United States Courts? Is the word "case" used in the act in the common synonymous sense of a "suit" or in some other sense?

Let the House Committee on Interstate Commerce speaking with full knowledge of the Acts already passed February 4 and February 11 answer these, questions in language that is conclu-

sive. The committee in its report of February 12, says of the above quoted words:

"The last amendment is for the purpose of giving to **suits** *com-*
"*menced in the name of the* **Interstate Commerce Commission**
"the benefit of an early hearing and disposition *in the same*
"*manner* as is provided for **suits** commenced *in the name of the*
"**United States** *by the recent act.*" (*See Report No. 3765, 57th Congress, 2d Session*).

This Court will observe that the appropriation of February 4 and the Expedition Act of February 12, only *applied to suits brought in the name of the* **United States**; hence the significance of the language of the proviso.

While such a report will not prevail if the language of the act is too clear to permit of a construction in harmony with it, if such act can be construed in harmony with it, it should be so construed. We must look at the "history" and the objects of such legislation to get at its intent. We must assume a sensible object; here a sensible object is stated by the report of the committee. That report has great weight. (*Am. N. Twine Co. vs. W., 141 U. S., 468-474*). It would be unreasonable to give the word "case" a broader or different meaning than the meaning the committee gave to it under such circumstances. The report shows the intent of the Congress, and that intent is the heart of this matter. The true rule is: "A thing may be within the letter of the "statute and not within its meaning; and within its meaning, "though not within its letter. *The intention of the law-maker is* "*the law.*"

Justice Swayne in *Smythe vs. Fisk, 23 Wall., 374-380*, approved *Hawaii vs. Mankichi, 190 U. S., 197-212*. Does the *Brimson Case, 154 U. S., 447*, require a different ruling? It does not. Why? Because that was not a case like this one, of issues being tried before the Commission. That was a case of an investigation by the Commission upon its own motion under Section 12 of the Act. If the Commission could not get aid from the courts to force witnesses to answer "*relevant*" questions, in such a case it was near its practical end. Judge Gresham decided against the Commission on that point. The Commission was legally

aggrieved thereby. In that case an examination of the original record shows the order itself "doth find that so much of *Section* "*12 of the Act known as the Interstate Commerce Act* as authorizes "or requires the courts to use their process in aid of inquiries "before the Interstate Commerce Commission, *is unconstitutional* "*and void* * * *. *And it is therefore ordered* that said appli- "cation or petition be * * * dismissed from which decision "* * * the District Attorney * * * on behalf of the "* * * Commission * * * by direction of the Attorney "General * * * prays an appeal to the Supreme Court "* * * which appeal is hereby allowed." See also conclusion opinion *Gresham, J., same case, 53 Fed., 481.*

No motion to dismiss that appeal appears to have been made. After Judge Gresham thus struck at the heart of the Commission if this Court had not sustained the Commission by a majority vote (*154 U. S., 456-490*), we can see from reading the dissenting opinion how disastrous to the Commission would have been a different decision (*155 U. S., 3-10*). See also opinion, Field, J., to same effect as to courts aiding investigating committees *In re Pacific Com., 32 Fed., 261.*

Without now rearguing the question involved, or noting how strong were the legal reasons for the dissent, we have shown that the order appealed from, the opinion accompanying it, and the opinions in this Court, all alike treated that case as one necessarily turning upon a constitutional question. That question was whether part of Section 12 of the Interstate Commerce Act there involved was "*unconstitutional and void.*" The Evarts Act under which that appeal was taken provides: "That appeals or writs "of error may be taken from the district courts or from existing "circuit courts direct to the Supreme Court in the following cases. "In any case that involves the construction or application of the "constitution of the United States." * * * "*In any case in* "*which the constitutionality of any law of the United States* * * "*is drawn in question.*" See: *2 Gould & Tucker's (p. 65) notes on R. S. U. S. for 1889 to 1897, C. 517 Acts of Congress, Mar. 3, 1891.* No other words of that act would have justified that appeal, or justify this one. The Brimson case was decided by Gresham, J., at circuit December 7, 1892, and by this Court May 26, 1894, so

those decisions were made by virtue of the words of the Evarts statute just quoted. But this case does not involve the construction or application of the constitution, or the constitutionalty of any law or treaty under that constitution. This case is only a case as to the "relevancy" of evidence, so that case is not applicable.

II.

Neither the Commission nor Mr. Hearst, has a legal interest in, or is now in position to maintain, this appeal, because it now presents nothing but abstract questions to this Court for discussion.

If the questions of evidence were relevant, or important, the trial before the Commission would have been stopped pending this appeal before closing the evidence. Instead, in the fall of 1903, Mr. Hearst gave further evidence and rested; his counsel then insisted, and the Commission required defendants to give evidence, which one or more did, and then all rested. The evidence was then closed. Thereupon the Commission set a day for final argument which has since been postponed from time to time at the instance of counsel for Mr. Hearst. The evidence in that case being closed, neither party has the legal right to give further evidence. When counsel for Mr. Hearst rested did he not terminate his right to give evidence? When the defendants rested did they not do the same thing? When the Commission set the day for final argument for various days in 1903, then in January, 1904, and then postponed such argument, did it not do the same thing?

Again; the original act provides, "that any *person* or *persons* "claiming to be *damaged* by any common carrier, subject to the "provisions of this act may *either* make complaint to the Com- "mission * * * or bring suit in his or their own behalf "for the recovery of damages * * * but such person or "persons shall not have the right to pursue both of said remedies "and must in each case *elect which one* * * * he or they "will adopt" (*Sec. 9, Interstate Commerce Act*). It is further provided: "that any person, firm, corporation or association, or any

"mercantile, agricultural or manufacturing society, or body poli-
"tic, or municipal organization, complaining of anything done
"or omitted to be done by any common carrier * * *
"shall briefly state the facts, whereupon * * * such com-
"mon carrier * * * shall be called upon to satisfy the com-
"plaint or answer the same in writing * * * it shall be the
"*duty of the Commission to investigate the matter complained of.*"
"* * * No complaint shall * * * be dismissed because
"of the absence of *direct* damages to the complainant." (Act, Section 13).

The result of such an "investigation" to be confined to the 'matters complained of" is "findings of fact" * * * thereafter in all judicial proceedings * * * "*prima facie* evi-
"dence." (Act, Section 14).

Now there is not one word in the statute authorizing a man who alleges he "*is of necessity* a purchaser of anthracite coal" (*p. 39*) upon being put to proofs of that fact (*pp. 43, 45, 49*) to fail in such proof and still maintain such a proceeding. He must show such an interest as will enable him to maintain a suit in equity for some remedy in behalf of himself, or others for whom he stands as legal champion, or he can maintain no proceeding before the commission. The provision that there must be no dismissal because "*direct* damage" is not shown as to "complainant" is to cover cases of corporations, chambers of commerce, cities and like complainants, who are heard as legal champions of public interests, or of citizens represented by them. For instance, they were not intended to cover the case of any mere stranger, who may see fit to file a complaint where he has no legal interest in the question raised, but where he merely hopes for gain, or fame therefrom. It is axiomatic that courts and commissions are not created, and do not sit at public expense, to try abstract questions, for there are as many real ones as they can handle. The third article of the constitution of the United States provides: "The *judicial* power of the United States shall "be vested in one Supreme Court, and in such inferior *courts* as "as the Congress may * * * ordain and establish." Of the exercise of such judicial power Ch. J. Marshall says: "*That "power is capable of acting only when the subject is submitted to it*

"*by a party who asserts his rights in the form prescribed by law. It* "*then becomes a case, etc.*" (*Op. Osborn vs. U. S. Bank, 9 Wheaton 819*). Is one a party in a legal sense if he has no legal interest in the matter? Can one who has no legal interest in the matter have any legal "controversy" about it? Is there any doubt about the answer made by our entire jurisprudence? If no coal shipper or consumer, then, has a real complaint to make, or a real "controversy" to submit, we are not required to try a fictitious one.

The railroad companies may be very bad, but we no longer try Satan once a year to hear his advocate in his defense. If Mr. Hearst can maintain this proceeding any citizen can start a case before the Commission, *or in a court*, about matters of which he shall complain, although he has no interest therein. And so contracts, sales, prices and corporation stocks, and rates on sugar, tea, flour, wheat, corn, steel, iron, or any of over eight thousand freight items carried by railroads, can be put on trial at the instance of the most curious, cranky, and legally disinterested citizen. Although he did not pass upon this question it is evident Judge Lacombe did not think the statute broad enough to enable Mr. Hearst to maintain his proceeding upon his showing (*p. 833*). This view is not weakened by the words used in the last amendment of the statute as to producing evidence in a case of this character, even if we construe those words to apply to the Interstate Commerce Act as we understand counsel for the Commission to claim. We deny such to be the true construction, but see how it works out. Those words are: "And in proceedings "under this act *and the acts to regulate commerce*, the said court "shall have the power to compel the attendance of witnesses *both* "*upon the part of the carrier and the shipper*, who shall be required "to answer on all subjects *relating* directly or indirectly to the "*matter in controversy*, and to compel the production of all books and papers, both of the carrier and shipper, which *relate* "directly or indirectly to such *transaction*" (*Act Feb. 19, 1903, Sec. 3*). "All acts * * * in conflict * * * are hereby "repealed" (*Act Feb. 19, 1903, Sec. 4*).

The act creating the Commission reads: "The Commission "or any party * * * may invoke the aid of any court of

"the U. S. in requiring the attendance and testimony of witnesses "and the production of books, papers and documents *under the "provisions of this section.*" (Act, Section 12.)

The Brimson Case, 154 and 155 U. S., wae an investigation by the Commission itself under this Section 12, and not a trial like this before the Commission under Sections 9, 13 and 14.

This case then stands like this. If this case rests upon the original act, that act gives authority to compel witnesses to testify, or produce papers in investigations by the Commission under Section 12, but the proceeding before the Commission is not under Section 12. If the amendments of 1903 apply, and we claim they do not, then they give "both" parties, *but not the Commission*, authority to institute this proceeding.

If this case rests, therefore, upon the words of the Act of Feb. 19, 1903, that act does not contain one word giving the Commission the right to institute, or maintain, this proceeding before Judge Lacombe, or to take this appeal. If it rests upon the original act, this proceeding is not under Section 12, which provides for investigations by the Commission itself such as that involved in the Brimson case. This point was not raised before Judge Lacombe, for the case was mainly argued as to whether it was an investigation under Section 12, or a trial under Sections 9, 14 and 13, and whether the evidence and contracts were relevant.

By the amendment of 1903, if that applies, a "shipper" could institute this proceeding. *But Mr. Hearst does not allege or prove he was a "shipper" or has any "transaction," or "controversy," with any "carrier," nor did Mr. Hearst institute this proceeding, or take this appeal, even if he was a "shipper" of coal, hence it must be dismissed.* This construction of these acts is in accord with their plain meaning. It confines such proceedings to real parties having real grievances. It excludes the unseemly sight of the Commission as a party aiding one of the parties in a proceeding of this character as to a case being tried before the Commission as a substitute for a Court of Equity. The Commission should not be able to institute a proceeding like this one to aid one party to the case being tried before it to defeat the other parties thereto. It cannot remain an impartial tribunal, if human, under these circumstan-

ces. And, independent of the statutes, the Commission is not a party legally "aggrieved." It has, or should have, no legal interest in the controversy being tried before it. Take an illustration. An executor cannot maintain an appeal because the Courts defeat his contention in his action to construe a will, when it appears the real question is whether a daughter, or a widow shall get $100,000. If the trial court awards it to the daughter, the widow, not the executor, must take the appeal, because the executor is not legally aggrieved. It is as true here as it was there that, "But when he seeks to have the judgment reviewed in this Court "he must be able to point some statute giving him the right and "conferring the jurisdiction * * * *An appeal to this Court "does not lie unless the party appealing has an interest in the con-"troversy"* (*Bryant vs. Thompson, 128 N. Y., 426, opinion 434-5*).

The language just quoted might have been used as well as to the necessity for a statute in a decision of this Court dismissing an appeal. (*Nat. Ex. Bk. vs. Peters, 146 U. S., 570*).

If a statute does not authorize the appeal the United States cannot maintain an appeal in this Court. (*U. S. vs. Ry. 105 U. S., 624*). Nor can an official succeed upon appeal when he is not legally aggrieved, even if other officials are aggrieved, who do not appeal. (*Cherokee Co. Com. vs. Wilson, 109 U. S, 626*). The principle is this: That a party not legally affected by a decision cannot appeal; so trustees of bondholders (*F., L. & T. Co. vs. Waterman, 106 U. S., 269*); a receiver (*Close vs. G. Cemetery, 107 U. S., 474*); or an unaffected party generally cannot appeal (*Brown vs. Smart, 145 U. S., 459*), and cases there cited. The Commission have and can have no legal "controversy" with the parties here, and by submitting the case to the Commission for decision upon further evidence without instituting this proceeding Mr. Hearst has shown he has no "controversy" to bring here, so no "controversy" is brought before this Court by the appeal and it must be dismissed (*Little vs. Bowers, 134 U. S., 547-652 and cases 558*).

Counsel for the Commission must admit the facts that cannot be disputed upon the argument, or they can be shown after argument on the merits by affidavits as was done in the last case. Whenever and however the facts stated appear they show

there is no real "controvery" here by appeal, no legally aggrieved party here appealing, so this appeal must be dismissed.

III.

The contracts and testimony involved are not relevant to any issue before the Commission.

The *Brimson case* treats the important part of this proposition as settled law. In the prevailing opinion, Mr. Justice Harlan said: "Neither branch of the government, still less any merely "administrative body, established by Congress, possesses, or can "be invested with a general power of making inquiry into the "private affairs of the citizen * * *."

As said by Mr. Justice Field, *In re Pacific R. Com., 32 Fed., 241-250*, "of all the rights of the citizen few are of greater "importance, or more essetal to his peace and happiness than "the right of personal security, *and that involves* * * * "*exemption of his private affairs, books and papers from inspection and scrutiny of others*" (*Op. 154 U. S., 478, 479, and cases cited*).

But if this is true it follows that no contracts, or testimony *can be lawfully forced from a citizen at the instance of a Commission, or by order of a Court for a Commission, unless it is relevant to some issue being tried, or some inquiry of which the Commission has jurisdiction.* This is also the conclusion of Mr. Justice Harlan. He says: "It was open to each of them to contend before that "Court * * * that neither of the questions propounded, nor "the books, papers, etc., called for, *relate to the particular, matter "under investigation, nor to any matter which the Commission is "entitled under the constitution or laws to investigate.*"

The order then under review was a final one dismissing the proceeding there *upon the sole ground that it was unconstitutional.* Such order was final upon that point, unless reversed upon appeal. In that view what is said there in the prevailing opinion about it being "final," and not "advisory" only, is correct (*op. 487*).

In such an order, therefore, *the primary question is that of "relevancy." But here the Commission seeks the opinion of this Court upon "relevancy;" not upon a constitutional question. They*

want the opinion of this Court to learn how to decide the main case now before them waiting their decision. They thus treat the order appealed from as interlocutory and not final. This appears from the brief submitted upon the motion to advance this appeal. In his brief, Solicitor General Hoyt, for the Commission, shows the order is interlocutory for he says: "*Said cause is awaiting final "submission before the * * * Commission and it is claimed " * * * that the decision of the issues must be governed by the "correctness of the ruling at the circuit * * * which is the "basis of the order herein appealed from.*" We have not so claimed, although that is erroneously asserted. But can the issues be so presented to this Court by this interlocutory appeal?

Here the order expressly shows that it rests upon the ground that the contracts and evidence sought are not "relevant." Had the Brimson order so shown we believe that Mr. Justice Harlan and the majority of the court would have been unanimously of the opinion of Mr. Justice Brewer and the minority in that case, and would have held that that order was really interlocutory and so not appealable. (*See op. 155 U. S., p. 3*). The Circuit Court may also, as Mr. Justice Brewer there held, refuse the order "for the "further reason that the questions propounded by the Commis- "sion to the witnesses are deemed *irrelevant or incompetent.*" (*Op. 155 U. S., 3*).

Suppose we are in error in previous argument. Let us assume, broadly, that the Commission have a "controversy" with the railroad companies, within the meaning of the decisions touching appeals, and within the meaning of the statute, and that they have the right to present this case to this court by appeal to obtain its opinion as to the relevancy of the testimony before them, *for contracts and evidence such as the contracts and evidence sought are before them*, what opinion should this court render as to the relevancy of such contracts and such evidence? Should it sustain the decision of Judge Lacombe, or should it overrule that decision? In answer to this question, it has been heretofore urged in behalf of the Commission that the Commission were investigating coal rates under Section 12 of the statute, rather than trying issues before them under Sections 9, 13 and 14. But whether this is correct or not may not be so important on

the question of relevancy as has been assumed on behalf of the Commission.

In the first place, Congress could not give the Commission power to inquire into the intra-state business of common carriers, and it has made it clear that it did not intend to do so by expressly limiting the inquisitorial powers of the Commission under Section 12, to "common carriers, subject to the provisions " of this act."

The only provision in the original Act for compelling the attendance of witnesses and the production of documentary evidence being within Section 12, it must be clear that the provision does not cover the "business" of "common carriers" not "subject to the provisions of this act."

Furthermore, to get at the intent of the Act on this subject, the Act must be read as a whole. When so read, we find in it unimpeachable evidence that it was not intended to give the Commission the power to inquire into the business of coal mining companies, or the business of coal mining, or the business of selling coal, even if coal mining corporations turn out to be railroad corporations, or corporations owned by railroads, where that is permitted, as in Pennsylvania. (*Com. vs. Erie, 132 Pa. St., 591; 139 Pa. St., 457*).

The business of such corporations engaged in mining and selling coal in Pennsylvania, whether that business is regarded as appertaining to real estate (*Brine vs. Ins. Co., 96 U. S., 627*), or domestic commerce touching personal property (*U. S. vs. Knight, 156 U. S., 1 and 11*), is all domestic business subject to the laws of the State of Pennsylvania, and not subject to the provisions of the Interstate Commerce Act. It follows, therefore, that the coal purchase contracts which appellee Sturges and appellee Richardson were asked to produce by the Commission are contracts touching mines and domestic business wholly within the State of Pennsylvania, and wholly outside of the jurisdiction of the Commission.

But the Act, which is the charter of the Commission, still more distinctly shows an intent to limit the Commission in its enquiries touching the business of common carriers, even where

the common carriers are subject to the Commission. In Section 20 of the Act, "common carriers subject to the provisions of this act" are required to make annual reports touching their capital stock, surplus funds, number of stockholders, funded and floating debt, cost and value of property, franchises and equipments, number and salary of employees of each class, amounts expended for improvements, the character of improvements, earnings from each branch of business, operating and other expenses, and balances of profit and loss.

Clearly, Section 12 and Section 20 are to be read together with Sections 1 to 5, for the purpose of getting at the intent of Congress as to the matters into which the Commission were given jurisdiction to make inquiry. The important matters committed to the jurisdiction of the Commission were interstate and not intrastate, rates, under Sections 1 to 5, when complaint should be made of them under Sections 9 and 13. In case of a complaint as to rates under those Sections, the Commission were to try and determine the case in accordance with Sections 13 and 14. As their determination was made "*prima facie* evidence as to each "and every fact found" under Section 14, it follows that that determination must rest upon relevant evidence, or the common carrier is deprived of due process of law, within the true meaning of those words.

This does not mean, of course, that the Commission may not hear much irrelevant evidence, as does a court of equity, without having its decision vitiated thereby, but it does mean that the Commission cannot force irrelevant evidence from common carriers by an order from the courts. It is of the very essence of the law that the courts shall refuse their order in every case where irrelevant evidence is sought. Otherwise, the Commission can use the courts to force irrelevant evidence from common carriers, and can then rest its decision upon such irrelevant evidence, and yet the carriers will be practically powerless to escape the consequence of such decisions, because the common carriers are not permitted to take a direct appeal from the decision of the Commission, and it is not ground for escaping the decision of the Commission when the Commission seeks to enforce it in the courts, that the Commission received and considered irrelevant evidence

in reaching its conclusions. In such a case, if the Commission has received some relevant evidence, and much irrelevant evidence, and has reached its conclusions because of the irrelevant evidence, where it would not have reached such conclusions upon the relevant evidence, the common carrier may still be unable to escape the force and effect of the Commission's finding of fact. It is important, therefore, when the Commission applies for an order to force the common carriers to give evidence, that the courts pass upon the relevancy of such testimony, precisely as they would if a case were upon trial before them where a shipper had sued a common carrier to recover back freight moneys paid under protest.

In such a case, the test of whether or not the carrier is making an excessive or an unjustly discriminating charge, is that found in the Act granting its powers to this Commission. *That test is that the common carrier shall not charge, demand, collect or receive more from one person than another "for doing for him or them a like and "contemporaneous service in the transportation of a like kind of "traffic, under substantially similar circumstances and conditions."* (*Act, Section 2*).

This statutory test is but a recognition of the common law test applied to charges of common carriers, lawyers, and wage earners. The test prescribed is the test by which all charges for work or materials must stand or fall. If we request that services be performed, or that materials be delivered, without inquiring what the price will be, the law implies a promise to pay their reasonable market value at the time and place of delivery. That reasonable market value is ascertained by taking evidence as to the market price of like services, or like materials, at that time and place. In this record there is a little evidence as to the rates upon bituminous coal, and there is a comparison suggested between the rates upon bituminous coal and the rates upon anthracite coal. There is some testimony suggesting that bituminous coal and anthracite coal are sufficiently alike so that the same rate should be applied to each, while the bulk of what little testimony there is from men like Mr. Baer, Mr. Thomas, and others, is to the contrary, and points out dissimilarities between bituminous coal and anthracite coal traffic,

to show that no comparison can be made between them. Such dissimilarity is pointed out in the large number of sizes of anthracite coal, which have to be kept separate from each other, thus requiring many expensive terminals, and much expensive switching, from which bituminous coal, consisting of practically but two kinds, is entirely free.

Upon the one side, it is suggested that the mileage of bituminous coal is greater than the mileage of anthracite coal, and upon the other side it is suggested that the mileage is not a very important factor.

The English and American courts alike have long recognized the fact recognized by every railroad man, that the movement of short-haul freight is much more expensive than is the movement of freight traveling a greater distance, and, therefore, *the mileage test, upon which Mr. Hearst's case really rests, has been rejected by the courts, for reasons recognized by this Court in the Tompkins case* (*176 U. S., opinion 178, 179*).

While the mileage test is not the important test, the comparison of anthracite coal and bituminous coal, or other traffic something like anthracite coal, is proper at common law, or under this statute for the purpose of ascertaining whether or not the rates upon anthracite coal are unreasonable.

In like manner, it was proper to ask many of the independent coal merchants, and officials of the coal companies, whether or not they obtained rebates, and whether or not all shippers were subjected to the same rates upon shipments of anthracite coal. As to all questions comparing anthracite and bituminous coal, or other like traffic, counsel made no objection. As to all questions touching whether or not rebates were given to either coal companies or independent operators, no objections were made. The testimony was universal that no rebates had been given except such as were given to all shippers, and that no rebates whatever had been given since the 65 per cent. coal purchase contracts had been negotiated.

Upon one other subject legitimate questions were asked and answered. It was proper to inquire whether or not freights had been pooled. For this purpose counsel put Mr. Harris and

other witnesses upon the stand, and put questions to Mr. Baer, Mr. Thomas and Mr. Truesdale. No objections were made to the putting of such questions, or to answers to such questions. The testimony clearly showed that there had been no pooling of freights, because they found, from many years' experience, as Mr. Harris sententiously put it, whether they fought for freights, or whether they did not, each road got about the same. Pooling, therefore, was not necessary. There was no testimony of any pool of freights or earnings, but if there had been, or if it can be argued otherwise, that is a subject for consideration and determination by the Commission itself.

But when we pass beyond reasonable rates, or discriminating rates, or pooled freights, what other question is there in the proceeding before the Commission over which the Commission has jurisdiction as to which of the contracts and evidence sought are relevant?

As we have pointed out, the coal purchase contracts sought from Mr. Sturges and Mr. Richardson had to do with coal purchased, delivered and paid for within the State of Pennsylvania. By the very terms of the contracts, the title to that coal passed absolutely to the railroads like the D. L. & W., or the D. & H., or to coal companies like many of those owned or controlled by the railroad companies, the moment that coal was put upon the cars at the breaker's mouth in Pennsylvania. From that moment, that coal was insurable by the purchasers, and if it was lost it was lost by the purchasers. From that moment, the purchasers could give good title thereto. The sellers were the creditors of the purchasers from that moment, to the extent of coal delivered. The only thing remaining to be done was for Mr. Ruley to determine the average monthly price of that grade of coal from that region, from the reports made to him for the month, and then the purchaser was to pay the seller that price for the coal delivered.

This was true of all the contracts except the contracts of the Ontario Railway Company, which contracts were not objected to, were put in without objection, and were straight transportation contracts. As to such contracts, or their legal effect, it is

unnecessary to make any argument here, because they are not involved in any way in this appeal.

In testing this evidence as to its relevancy, we are to bear in mind always that the Commission has no jurisdiction over any one except common carriers. It is confined to the "business" of common carriers *as such*. It has no jurisdiction over any one except common carriers as to interstate common carrier business. The very first Section of the Act begins: "that the provisions "of this act shall apply to any *common carrier* or carriers engaged "in the *transportation of property* or persons * * * for a "continuous carriage or shipment from one state or territory "* * * to any other state or territory, * * * and also to "the transportation, in like manner of property shipped * * * "to a foreign country."

As if this limitation were not stout enough, that Section proceeds:

"Provided, however, that the provisions of this act *shall not* "*apply* to the transportation of passengers or property, *or to* "*the receiving, delivering, storage, or handling of property wholly* "*within one state.*"

This limitation clearly covers the case of buying and "delivering" coal at the breaker's mouth in the State of Pennsylvania. It as clearly covers the case of selling coal delivered by lighters at the wharves in the City of New York. It cuts transportation out, and makes that a subject of inquiry by the Commission. It excludes from the consideration of the Commission either the purchase of the coal or the sale of the coal. It is the interstate transportation of the coal, and that alone, with which the Commission has to deal. The Commission can investigate the interstate transportation on its own account, under Section 12, or it can try a case involving that transportation, at the instance of a complainant, under Sections 9 and 13.

Nor does this view of the law deprive the Commission of any necessary power. The Commission has accomplished, and we trust will hereafter accomplish, much good by exercising its power. If they had the power to inquire into the purchase and sale of coal

and commodities for the purpose of fixing or affecting the price of such commodities, as counsel for Mr. Hearst requested in his opening, they would have a power greater than ought to be committed to any such body by any government. Congress has given no such power to this Commission, or any other body. Whether or not Congress possesses any such power, under the clause of the Constitution giving it the right to regulate interstate commerce, it has never attempted to exercise any such power. No statesman has ever sought to persuade, or succeeded in persuading the people of this country that any such power should be committed to any body whatever. Whatever the defects of our civilization or our government, it is certain that our railroads and our civilization have achieved their success very largely because their initiative in such matters has been left untrammeled by state legislatures and by Congress.

It is clear that the Commission, in discharging its functions, should be confined to interstate transportation matters, precisely as the first section of the act creating it undertakes to confine it to transportation matters that are interstate in character. If so confined, is it not clear that all the questions and contracts touching the purchase or sale of coal, or the details of such sale, or the purchase or sale of coal mines, or of mining corporations, is entirely outside of the jurisdiction of the Commission?

In trying the question of whether or not the charge of a common wagoner—a common carrier—is reasonable, no one would think of inquiring as to how much property he had, or what the mortgages were upon it, or how much money he had made, or what other businesses he was interested in that furnished him transportation, or what he charged to capital account and what to operating expenses. In such a case, the plain question would be whether his charge was too high when compared with other charges of himself or others for the like service, at the like time and place. A railroad is such a common carrier, its cars are called "wagons," yet in some parts of Europe, the law that governs its business is the law of common carriers as developed when the wagons did not run upon steel rails, and that law determines the question of relevancy as it was determined by Judge Lacombe in the court below.

We submit that the appeal of the Commission should be dismissed, or the order appealed from should be affirmed upon the merits.

GEORGE F. BROWNELL,
ADELBERT MOOT,

Attorneys for Appellees,
G. A Richardson and E. B. Sturges.